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Brf. of Worthington & Frailey
for Respondent.

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# Supreme Court of the United States.

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THE UNITED STATES EX RELATIONE THEODORE QUEEN ET AL., PETITIONERS,

vs.

RICHARD H. ALVEY, CHIEF JUSTICE, ET AL., RESPONDENTS.

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## BRIEF FOR RESPONDENTS.

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# Supreme Court of the United States

## OCTOBER TERM, 1900.

*Original, No. 17.*

THE UNITED STATES ex RELATIONE THEODORE QUEEN ET AL., PETITIONERS,

*vs.*

RICHARD H. ALVEY, CHIEF JUSTICE, ET AL., RESPONDENTS.

## BRIEF FOR RESPONDENTS.

The only question involved in this case is whether the present Rule XV of the Court of Appeals of the District of Columbia limits the time within which the transcript must be filed in that court on an appeal from a judgment or decree of the Supreme Court of the District of Columbia, in cases where the appeal does not operate as a supersedeas. The rule as originally promulgated in 1893 is printed on pages 1 and 2 of the answer of the respondents to the rule to show cause. The amendment made in September, 1894, is shown on page 3 of the answer.

There are no statutory regulations governing appeals to the Court of Appeals of the District of Columbia. Section 7 of the act of February 9, 1893, provides "that any party aggrieved by any final order, judgment, or decree of the Supreme

Court of the District of Columbia, or of any justice thereof, may appeal therefrom to the Court of Appeals hereby created; and upon such appeal the Court of Appeals shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just" (27 Stat., 434). Section 6 of the same act provides "that the said Court of Appeals * * * shall make such rules and regulations as may be necessary and proper * * * for the time and method of the entry of appeals and for giving notice of appeals thereto from the Supreme Court of the District of Columbia, and such other rules and regulations as may be necessary and proper in the premises." By section 6 of the act of July 30, 1894 (28 Stat., 160, 161), it is further provided that "said Court of Appeals shall have the power to prescribe what part or parts of the proceedings in the court below shall constitute the record on appeal and the form of bills of exception and to require that the original papers shall be sent to it instead of copies thereof and *generally to regulate all matters relating to appeals whether in the court below or in said Court of Appeals.*" By their return the respondents show that prior to the adoption of the rule in question in 1894 they had learned that a question had been made as to whether the forty-day limit applied in cases where the appeal did not operate as a supersedeas, and that the amendment which they then made was adopted for the very purpose of removing the suggested ambiguity and making that limitation apply to "all cases." They further show that in every case that has arisen since September, 1894, the rule, as so understood, has been enforced.

In the case of the District of Columbia *vs.* Humphrey, 11 Apps. D. C., 68, the appeal was dismissed for the sole reason that the transcript was not filed within the forty days. It is true that the appeal in that case operated as a supersedeas, but as the respondents state in their return, and as will ap-

pear from a perusal of the opinion in that case, it was decided without any reference to that fact.

The volume in which this opinion is reported was published two years before the taking of the appeal in the present case.

In Mackall *vs.* Willoughby, 8 App. Cas. D. C., 143, which was decided in March, 1896, it was expressly held that the forty-day limit applied in a case where there was no supersedeas.

That the rule in question applied and covered the case at bar was recognized by counsel who represented these petitioners in the Supreme Court of the District. The judgment of which they complain was rendered May 10, 1900, and their appeal was perfected May 17, 1900 (Petition, pages 4, 5). As in computing the forty days Sundays and holidays are excluded (Answer, page 4), the forty days in this case expired on the 5th day of July, 1900. On July 2, 1900, on the application of the petitioners, the trial justice signed an order extending the time for filing the transcript "*forty days from the expiration of time limited by the rules of said Court*" of Appeals (Petition, page 6; Answer, page 8). If, as is now contended, the forty-day limitation did not apply to the case, the application for this order and the making of it were vain things. The extension of forty days (again excluding Sundays) expired on the 21st day of August, 1900. On the 15th day of September, 1900, counsel for the petitioners moved the court, "now for then," to again extend the time for filing the transcript (Answer, 7). This application was accompanied by an affidavit made by the counsel for the petitioners, in which he stated "*that the time limited by the order of July 2nd, 1900, to file the transcript, expired on August 20th, 1900, and by an oversight and mistake of affiant,* the motion to still further extend the time was not made before August 20th" (Answer, 9). The same justice who had made the previous order on this appli-

cation did, on the 21st day of September, 1900, undertake to make an order, "now for then," extending the time for filing the transcript "from the expiration of said last extension to and until the 15th day of October, 1900" (10). It is now contended by other counsel that neither this order, nor the preceding one, was necessary; that there had been no oversight or mistake; that the petitioners had a right under the rule of the Court of Appeals, without any order from either the lower or the upper court, or any justice thereof, to file their transcript at any time during the term of the Court of Appeals, which began on the 2d day of October, 1900, and did not terminate until the 1st day of January, 1901.

It therefore appears that the construction of the rule in question, which was intended by the Court of Appeals when it was made; which it had declared in the case of the District of Columbia *vs.* Humphrey and in Mackall *vs.* Willoughby to be the proper construction; and which for a term of years had been acted upon by both courts and by the bar generally, was perfectly understood by the counsel who represented these petitioners in the Supreme Court of the District of Columbia; that he proceeded upon the theory that the forty-day limit applied to the case, and that the trial justice was of the same opinion. Even, therefore, if there be any ambiguity in the rule, that construction should be followed here which was placed upon the rule by the court that made it and which has since received the acquiescence of everybody, including the very parties who now complain of it.

The decisions of this court as to the construction of its rules regulating the time for filing transcripts when a case is brought here by writ of error or appeal are not applicable. Section 997 of the Revised Statutes of the

United States requires that there shall be annexed to and returned with a writ of error from this court a transcript of the record, an assignment of errors, a prayer for reversal, and a citation to the adverse party. Section 1012 provides that appeals to this court shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error. Under these statutes this court has a rule, No. 8, relating to "Writ of error, return, and record," the fifth paragraph of which rule provides that "All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, *and be served before the return day.*" Rule 9 of this court makes it the duty of the plaintiff in error, or appellant, to file the record here "on or before the return day." As the writ of error, or other corresponding process, need only be served before the return day and the courts from which the records are to come are situated all over the United States, it is manifest that it could not have been intended that the plaintiff in error or appellant should be put in a position of having to prepare his record and have it at Washington in twenty-four hours.

But whatever the reason of the rule, which has been so long established in this court, that where no motion to docket and dismiss is made the record may be lodged here at any time within the term following the issuing of the writ of error, there is no correspondence between this procedure and that which has obtained in the courts of the District ever since the organization of the Supreme Court of the District in 1863. Cases were taken from the Supreme Court of the District in special term to the court in general term by appeal only (12 Stat., 763), and when the appellate jurisdiction of the court in general term was abolished and the Court of Appeals created, appeals only were provided for. That court having very broad and exclusive powers in the matter of regulating appeals, both as to pro-

cedure in the lower court and in the Court of Appeals, it has provided a rule applying to all cases, by which transcripts must be filed within forty days from the perfecting of the appeal, unless the time be extended as provided by the rule. As there is no writ to be returned, so there is no room for arguing that it may be returned at any time during the next term. The failure to file the record within the time limited is as fatal to the jurisdiction of the appellate tribunal as would be the failure to take the appeal within the time limited by the rules. In either case, the power of the Court of Appeals over the case is at an end.

This court has held many times that unless the transcript of the record be filed before expiration of the term next after the taking of the appeal or writ of error, it is without jurisdiction to entertain the cause. In Hill *vs.* Chicago, &c., Railroad Company, 129 U. S., 170, 174, the court say: "It is well settled by repeated decisions of this court that it has no jurisdiction of an appeal unless the transcript of the record is filed here at the next term after taking the appeal."

So in Small *vs.* Northern Pacific Railroad Company, 134 U. S., 514, when it appeared that the record had not been filed within the time limited by the rules of this court, the appeal was "dismissed for want of jurisdiction."

These cases are a sufficient reply to what is said in the adverse brief by way of criticism of the action of the respondents in dismissing the appeal in the present case because "they were without jurisdiction to entertain said appeal."

For the foregoing reasons it is respectfully submitted that the rule to show cause issued against the respondents herein should be discharged.

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